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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. RONALD EPPINGA,

Petitioner,

v.

JIM EDGAR, SECRETARY OF STATE,
STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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QUESTION PRESENTED FOR REVIEW

1. This case presents the question whether the Illinois Supreme Court has misapplied the Due Process test of *Matthews v. Eldridge*, 424 U.S. 319, to permit the Secretary of State of Illinois permanently and summarily to revoke Petitioner's driver's license, without notice or hearing, based upon the administrative conclusion that Petitioner was in fact guilty of drunk driving—a conclusion drawn from a secret *ex parte* administrative review of police reports alone, and not from the results of any criminal or civil proceedings in any court.

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Petitioner, RONALD EPPINGA, by his attorneys, petitions for a Writ of Certiorari to review the judgment of the Supreme Court of Illinois affirming the judgment of the Circuit Court of Cook County, Illinois, granting the Motion of the Respondent, Secretary of State of Illinois, for summary judgment and denying Petitioner the relief he sought in that court.

OPINIONS BELOW

The case was decided in the Circuit Court of Cook County, Illinois by an unpublished order and Memorandum of the Honorable Anthony J. Scotillo, Judge, entered on March 22,

1985 and April 1, 1985, respectively. Both are reproduced in the Appendix at pages 10a and 12a. On direct appeal to the Supreme Court of Illinois, the case was decided in an opinion of Justice Ward for the Court which has not yet been published. We have reproduced the Supreme Court opinion in the Appendix at page 1a.

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on April 18, 1986. This Court's jurisdiction is invoked pursuant to Title 28, United States Code, Section 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The case involves the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. ". . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . ."

STATUTE INVOLVED

Chapter 95½ of the Illinois Revised Statutes, Section 6-206 provides:

> "*Discretionary authority to suspend or revoke license or permits—right to a hearing.* (a) The Secretary of the State is authorized to suspend or revoke the driving privileges of any person without preliminary hearing upon showing of such person's records or other sufficient evidence that such person:
>
> (1) Has committed an offense for which mandatory revocation of a driver's license or permit is required upon conviction."

STATEMENT

On January 9, 1985, Petitioner was arrested in connection with an automobile accident in a Chicago suburb and charged with driving under the influence of alcohol. He made bail and appeared in the appropriate branch of the Circuit Court of Cook County from time to time to respond to the criminal complaint. Long before that case was resolved, on February 15, 1985, the Respondent Secretary of State issued an order revoking Eppinga's driver's license. R. C-14.[1] The Order of revocation states that the Secretary's action was taken pursuant to Section 6-206(a)(1) of the Illinois Vehicle Code, 95½ *Illinois Revised Statutes,* 6-206(a)(1). The Order went on to point to the portion of the Statute invoked. It states:

> "This action is taken as a result of your having committed an offense for which mandatory revocation of license or permit is required upon conviction."

That portion of the form on which the Order is written providing spaces for the dates of conviction, description of offense, etc., had been left blank, and the typed words, "This portion does not apply to your revocation" appeared above that space. The Order also advised Eppinga of his option to request an administrative hearing in writing.

Instead, Petitioner filed suit in the Circuit Court of Cook County seeking *mandamus, quo warranto,* and declaratory relief from the Secretary's action. He supplemented his complaint with an emergency motion for temporary restraining order. The affidavits filed in support of the motion indicate that Eppinga is required to drive over the entire State of Illinois to the extent of approximately 23,000 miles per year in the course of his employment. Eppinga's affidavit also states, and the

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[1] The reference is to the common law record of pleadings filed in the Circuit Court as compiled by the Clerk of that Court.

Secretary does not contest, that he has no previous record of driving under the influence. R. C-31.

The Attorney General of Illinois appeared for the Secretary and filed a motion to dismiss. Briefing on the motion indicated the lack of any substantial contested issue of fact and so the Circuit Court, the Honorable Anthony J. Scotillo, Judge, took the matter as upon cross motions for summary judgment. On March 22, 1985 that Court entered an order granting summary judgment to the Secretary. App. 10a. The Court's memorandum order followed on April 1, 1985. App. 12a.

Because of the importance of the question presented to the administration of the drivers' license laws in Illinois, the Supreme Court of that State heard Petitioner's direct appeal and affirmed the Circuit Court's decision on April 18, 1986.

In support of his motion in the Circuit Court the Secretary filed those documents upon which his initial revocation action was predicated. They consist entirely of the police reports concerning the accident and Eppinga's arrest. R. C-65-79. The reports were provided to the Secretary by the office of the State's Attorney of Cook County with a cover letter dated January 30, 1985. There is no other evidence in the record.

REASONS FOR GRANTING THE WRIT

ADMINISTRATIVE LICENSE REVOCATION PROCEDURES, *EX PARTE* AND *IN CAMERA*, BASED SOLELY UPON HEARSAY REPORTS OF PROSECUTOR AND POLICE, AS UTILIZED BY THE SECRETARY OF STATE OF ILLINOIS AND APPROVED BY THE SUPREME COURT OF ILLINOIS DENY DUE PROCESS.

The Supreme Court of Illinois in the case at bar approved a construction of the Illinois driver's licensing law which permits the Secretary of State to revoke a driver's license without hearing and without notice, based not upon the licens-

ee's conviction of any crime or traffic violation, nor upon the judgment of any court, but solely upon the hearsay advice of a prosecutor's office that the licensee is guilty of a crime and the supporting police reports. The Supreme Court of Illinois, moreover, has taken this action with the explicit statement that the construction of the Due Process clause of the Fourteenth Amendment adopted by this Court in three decisions, *Matthews v. Eldridge,* 429 U.S. 319, *Dixon v. Love,* 431 U.S. 105, and *Mackey v. Montrym,* 443 U.S. 1, supports it. We suggest that the Supreme Court of Illinois has misapplied those decisions of this Court and that they justify nothing like what occurred in this case. We seek this Court's Writ of Certiorari not only to correct the misapprehension of this Court's constitutional decisions, but as well because of the importance of the question presented to the administration of drivers' licensing laws.

We begin with the unchallenged proposition that the citizen's ability to drive an automobile lawfully constitutes a property interest protected by the Due Process Clause. That much was established in *Bell v. Burson,* 402 U.S. 535. Noting empirically that many persons' livelihoods depend upon their continued ability to lawfully drive, this Court determined that such licenses may not be suspended or revoked in contravention of the procedural requirements of the Due Process Clause. It has been the burden of subsequent opinions to determine in specific instances precisely what those procedural requirements are.

Three subsequent decisions of this Court are most pertinent in this connection: *Matthews v. Eldridge,* 424 U.S. 319; *Dixon v. Love,* 431 U.S. 105; and *Mackey v. Montrym,* 443 U.S. 1. *Matthews v. Eldridge* set out in detail the factors to be balanced in analyzing the adequacy of the procedures accompanying the deprivation of a protected interest. Those factors are primarily three: 1) the private interest affected by the official action, 2) the risk of an erroneous deprivation resulting from the procedures utilized along with the marginal value of additional

procedural safeguards, and 3) the governmental interest involved from both a functional and a fiscal or administrative viewpoint. Pursuing the *Eldridge* analysis and applying it to the instant case, the private deprivation involved here is most significant, the risk of error attendant upon the procedures the Secretary has determined to utilize nothing short of immense, and the cost of better, fairer and concededly constitutional procedures minimal. We both recognize and appreciate the governmental interest involved in approaching the serious social problem of drunken driving. It does not deprecate that interest to insist that the problem be dealt with in a manner consistent with the dictates of the Constitution. Certainly the State has a legitimate governmental interest in denying its roads to drunken drivers but there is an equally certain corresponding obligation upon it not to deprive its citizens of their property without due process of law.

Since the importance to him of Petitioner's private interest in his ability to drive lawfully in connection with his employment clearly appears from the affidavits, little need be said concerning that element of the *Eldridge* equation. Contrary to the Trial Judge's opinion a citizen's ability to drive may well be as significant as the continued social insurance payments involved in *Goldberg v. Kelly,* 397 U.S. 254. That much is implied in *Bell v. Burson,* 402 U.S. 535, and the economic welfare of the citizen is involved in both situations. If the Secretary's revocation action, moreover, were later determined to be erroneous, as for instance upon acquittal of the criminal charge, there is no compensating the licensee for the erroneous deprivation of his property interest in the interim.

We should also point out that this case involved license *revocation,* not suspension. Such cases as *Dixon* and *Mackey* involved suspensions for a fixed period of time, usually ninety days or six months, upon the expiration of which the license is reinstated automatically upon payment of fees. Restoration here is not automatic but requires reapplication to the Secretary

and the reapplication may be rejected for reasons having nothing to do with the original cause of revocation. The more serious the deprivation of the individual's property interest, the more imperative the scrupulous observation of the Due Process Clause becomes.

The first inkling Petitioner received that the Secretary contemplated proceedings against him under Section 6-206(2)(1) was the Notice of Revocation—a *fait accompli.* That procedure totally and completely eliminated any prior notice. It also eliminated any indication to the licensee of the evidence with which the Secretary had been provided and upon which he relied. Indeed the Secretary's regulations specify that his only source of information shall be the office of the appropriate State's Attorney. This Petitioner first learned of the evidence upon which the Secretary revoked his license when the Secretary's file was appended as an exhibit to the Attorney General's Reply Memorandum on Motion to Dismiss in the Circuit Court. R. C.-65, *et seq.* Under the statute the Secretary must determine that the driver has "committed an offense." Historically, determinations of guilt or innocence of criminal charges never have been accomplished very well in secret. That particular feature of the procedures the Secretary has adopted could provide the raw material for an historical treatise tracing its lineage at least as far as the Star Chamber. We will, however, state only that the degree of secrecy in which decisions are made directly contributes to the potential for error in their making. If we believe in a system involving the public resolution of disputes in an adversarial fashion—and the Due Process Clause indicates that we do—we simply cannot justify attaching significant legal consequences to such determinations made both *in camera* and *ex parte.*

We are not dealing here with the comparatively simple decision whether any one individual has been convicted of three traffic violations in any one year or, indeed, if he has been convicted of drunk driving by a court of competent jurisdiction. That kind of determination can be made extremely accurately

simply by reading a record, the factual basis of which is almost never in dispute. This case is very different. This case involves the bedrock determination whether Petitioner has committed an offense. That is the precise question the judicial forum is constituted to resolve. Procedures have been developed over literally centuries for the purpose of insuring against error in that resolution as nearly as may be. The Secretary does not pretend to have become involved in the kind of competent consideration of all of the relevant evidence available in court. All the Secretary knows is what the State's Attorney tells him and substantially all of that is hearsay.

Dixon v. Love, 431 U.S. 105, is a precise example of the kind of case in which the *Eldridge* analysis yields precisely the opposite result. The licensee in that case had been *convicted* of two speeding violations in 1974, warned that a subsequent *conviction* would lead to loss of driving privileges and, yes, subsequently *convicted* of a third speeding violation. It is apparent as a practical matter that the Secretary's risk of error in acting without a hearing in that case was minimal and the governmental interest in removing the driver from the road was high. The due process interests there are amply protected by a post-deprivation hearing. But that case bears no honest comparison to this. To adequately compare this case with *Dixon v. Love* with respect to risk of error, it would be necessary to compare the number of times clerical errors result in the attribution of a conviction of a moving violation to the wrong driver with the number of times persons charged with the offense of drunk driving are eventually acquitted in court.

At best, all the Secretary could know with any degree of certainty was the State's Attorney's basis for bringing a criminal charge against Petitioner. It does not denigrate the office of the Secretary of State to state that it is simply incompetent to try the issues involved in a criminal lawsuit in secret on the basis solely of hearsay evidence furnished by one party alone without notice to the other.

The timing of the Secretary's action also militates against the reliability of his determination. While adversary litigation is pending neither the police officer, usually the complaining witness, nor the Assistant States' Attorney can be described as objective, neutral, or dispassionate. The demands of an adversary system quite properly render that impossible. A licensee's protected interests are compromised on the basis of secret statements by the main witness against him and the attorney for the opposing side of serious lawsuit.

The case at bar does not involve the provisions of the Illinois Motor Vehicle Code, Chapter 95½, Illinois Revised Statutes, which were before this Court in *Illinois v. Batchelder*, 463 U.S. 1112. Implied consent is not at issue here. In *Batchelder* this Court, *per curiam*, sustained the application of the Illinois implied consent statute based on police affidavits which did not detail the minutiae of probable cause. Pertinent to the *Eldridge—Mackey* kind of analysis, the opinion noted:

> "There is no concern or risk under the Illinois statute that a driver will be deprived of his license prior to a hearing. [The Illinois Statute] clearly grants a driver the right to have a hearing before his license is suspended. Clearly then, the fact that [the Illinois Statute] provides for a **predeprivation** hearing abundantly weights this second part of the Eldridge analysis in favor of the constitutionality of the Illinois implied-consent scheme." 463 U.S. 1112, 1117 [emphasis in original].

In this case, the procedure approved by the Illinois Supreme Court eliminates predeprivation hearings entirely and alters both the burden of proof and the issues involved in a post-deprivation hearing. In his Brief in the Supreme Court of Illinois, the Secretary took the position that, "[T]he party requesting the hearing must satisfy the Secretary that his continued driving does not pose a threat to public safety . . ." Brief for Defendant-Appellee, 16.

If the deprivation of private interest is significant and the risk of error high, the cost of alternative and constitutional procedures in the situation presented in minimal. We advance two alternatives. The Secretary could simply wait until a determination of Petitioner's culpability has been made by a court competent to make it and then act upon the record of that proceeding. Or, he could provide for a predeprivation hearing with the constitutional safeguards that entails. We recognize that due process in an administrative context does not mean all that phrase implies in a criminal courtroom but it certainly encompasses adequate notice and an opportunity to be heard. *Goldberg v. Kelly,* 397 U.S. 254; *Groppi v. Leslie,* 404 U.S. 96. We, therefore, conclude that an application of the analysis suggested in *Matthews v. Eldridge,* 424 U.S. 319, results in the conclusion that the Secretary's revocation action in the instant case denied due process.

That conclusion is not altered by a consideration of any limitations upon the Secretary's power. The limitation of the Secretary's regulations, Section 1040.35, to cases involving bodily injury or death is a limitation imposed by the Secretary himself. Further, it is a limitation which does not really comport with the factors considered in the due process balance. Certainly the governmental interest in highway safety does not extend to denying the roads to drunk drivers only after they have injured or killed somebody. The case for the Secretary's action in revoking a driver's license when the licensee has been accused of drunk driving is the same whether there has been an accident or not.

The further limitation the Secretary's regulations place upon summary revocation concern precisely those aspects of the matter most dubious from a due process perspective. We agree that under his regulations the Secretary cannot act *sua sponte* upon no evidence at all. But the evidence the regulations require must be totally provided by the State's Attorney; in addition, it will in virtually every case consist entirely of

hearsay. Far from assuring reliability, even minimal reliability, such a process runs counter to every procedural safeguard developed historically explicitly for the purpose of assuring reliability. There is no attorney for the licensee; there is no confrontation; there is no public trial; there is no cross-examination; there is not even the right to present countervailing evidence. The regulations provide not only that the State's Attorney shall be a sufficient source of evidence, but that he shall be the only source. Rather than saving the procedure utilized in the instant case, the Secretary's regulations, in fact, condemn it.

We agree with the opinion of the Court below that drunk driving constitutes a serious social problem facing our society. For that precise reason, we suggest that new and distinct approaches to that problem are and will be continually sought. Some are sound; some are not. Many will involve one variety or other of administrative procedures and, of these, some conform to the requirements of the constitution and some do not. Respectfully, we suggest that authoritative consideration by this Court is not inappropriate. For that reason, because of the importance of the question presented, we seek this Court's Writ of Certiorari to review, and eventually reverse, the judgment of the Supreme Court of Illinois.

CONCLUSION

For the reasons discussed above, we respectfully petition this Court to issue its Writ of Certiorari to the Supreme Court of Illinois to review that Court's judgment in the instant case.

Respectfully submitted,

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Appendix

Docket No. 61638—Agenda 25—November 1985.
THE PEOPLE *ex rel.* RONALD EPPINGA, Appellant, v.
JIM EDGAR, Secretary of State, Appellee.

JUSTICE WARD delivered the opinion of the court:

On March 1, 1985, the plaintiff, Ronald Eppinga, filed a complaint against Jim Edgar, the Secretary of State, in the circuit court of Cook County seeking restoration of his driving privileges and a declaration that the provision of the Illinois Vehicle Code (Code) (Ill. Rev. Stat. 1983, ch. 95½, par. 1—100 *et seq.*) under which his license was revoked was unconstitutional. On March 22, 1985, the court granted summary judgment in favor of the Secretary of State (Secretary), and we granted the plaintiff's motion for direct appeal under our Rule 302(b) (94 Ill. 2d R. 302(b)).

On January 9, 1985, the plaintiff was involved in an automobile collision in Proviso Township. The Police officer who came upon the scene determined that the plaintiff was traveling southbound in a northbound lane of a four-lane divided highway and struck a northbound vehicle head-on. The reporting officer and a companion officer detected a "strong odor" of alcohol on the plaintiff's breath and observed that his face was flushed and that his eyes were bloodshot. His speech was described as "confused" and "incoherent." The plaintiff first said that he did not know where he was and admitted to having had four or five drinks of scotch. He was arrested and charged with the offense of driving under the influence of alcohol (Ill. Rev. Stat. 1981, ch. 95½, par. 11—501(2)). The driver and the passenger of the other vehicle were severely injured. The driver sustained a broken left knee, sprained left ankle, ruptured left lung, and multiple contusions on her face. The passenger's left arm was fractured in two places, requiring surgery. She also suffered a swelling of the facial area, a loss of short-term memory, and blurred vision. Weeks after the accident she continued to experience loss of memory and double vision.

On January 30, 1985, the State's Attorney of Cook County prepared a "Request for Administrative Revocation" certifying that the described charge had been filed against the plaintiff, and that serious bodily injury had resulted from the collision. The State's Attorney forwarded this request and the police reports to the Secretary. The Secretary found that the case was one in which he was authorized, under the Code and his own administrative rules, upon a showing of sufficient evidence, to revoke the plaintiff's driving privileges prior to his trial, because the offense was one "for which mandatory revocation of license or permit is required upon conviction" (Ill. Rev. Stat. 1983, ch. 95½, par. 6—206(a)(1)), and the incident leading to the charge "resulted in serious bodily injury or death" (8 Ill. Admin. Reg. 2200, 2203 (Feb. 17, 1984) (codified at 92 Ill. Admin. Code, ch. II, sec. 1040.35)).

In part, section 6—206 provides:

"Discretionary authority to suspend or revoke license or permit—Right to a hearing.

(a) The Secretary of State is authorized to suspend or revoke the license, permit or driving privileges of any person without preliminary hearing upon a showing by his records or other sufficient evidence that such person:

1. Has committed an offense for which mandatory revocation of license or permit is required upon conviction.

* * *

(c) 1. Upon suspending or revoking the license or permit of any person as authorized in this Section, the Secretary of State shall immediately notify such person in writing of the order revoking or suspending the license or permit. Such notice to be deposited in the United States mail, postage prepaid, to the last known address of such person.

* * *

* * * the driver may request a hearing pursuant to Section 2—118 of this Code." (Ill. Rev. Stat. 1981, ch. 95½, par. 6—206.)

Section 2—118 of the Code provides that if a hearing is requested, the date of the hearing shall be set within 20 days of receipt of the licensee's request. (Ill. Rev. Stat. 1983, ch. 95½, par. 2—118(a).) Section 2—118(d) provides that "no person is [to be] deprived of due process of law," and the provision following states that the decision of the Secretary is subject to review in the circuit court. (See Ill. Rev. Stat. 1983, ch. 95½, par. 2—118(e).) Section 6—206(c)(3) provides that if the revocation is not rescinded by the Secretary after hearing, the driver may apply for a restricted driving permit to relieve "undue hardship."

The Secretary has adopted rules applicable to section 6—206. A statement of the rules is important for an understanding of the Secretary's action under the section:

> "b)1) When the Secretary of State has received *sufficient evidence* that a person has committed one or more of the following offenses or similar provisions of a local ordinance:
>
> A) driving under the influence of alcohol, other drugs or a combination thereof;
>
> * * *
>
> and these offenses, currently awaiting court disposition, *resulted in serious bodily injury or death*, the driving record of the individual shall be reviewed for possible drivers license revocation by the Department of Driver Services.
>
> 2)A) In determining whether or not action should be taken, the driving record and other sufficient evidence showing that the person has committed such an offense shall be examined. '*Sufficient evidence*' shall be defined as:
>
> i) copies of court documents showing the charging of a person for one or more of the named offenses in paragraph (b) of this section; or
>
> ii) transcripts of coroner's proceedings***
>
> iii) affidavits of eye witnesses***

iv) any other competent evidence. Examples of what would constitute other competent evidence include but are not limited to; laboratory reports, accident reports and other documentation deemed important and probative by the State's Attorneys.

B) Such information shall be provided with a letter of transmittal from the appropriate State's Attorney.

3) 'Serious bodily injury' shall be defined as:

A) bodily injury which involves a substantial risk of death; or

B) unconsciousness; or

C) extreme physical pain; or

D) protracted and obvious disfigurement; or

E) protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

4) If sufficient evidence is received from the State's Attorney and indicates that a person has committed one or more of the named offenses in paragraph (b) of this Section, and that these offenses, currently awaiting court disposition involved a motor vehicle accident which caused serious bodily injury or death, the driving privileges of the individual shall be revoked. ***" (Emphasis added.) 8 Ill. Admin Reg. 2200, 2203-04 (Feb. 17, 1984) (codified at 92 Ill. Admin. Code, ch. II, sec. 1040.35).

Upon the determination to revoke the plaintiff's license pursuant to these rules, the Secretary sent written notice of the revocation to the plaintiff, as provided for by the Illinois Vehicle Code. In the notice the Secretary explained the availability of a "prompt" hearing at the plaintiff's request. The plaintiff did not request a hearing but instead filed the complaint seeking *mandamus, quo waranto,* and declaratory relief to restore his driving privileges.

The plaintiff contends that because he was not given a prerevocation hearing he was denied due process of law.

Once issued, a driver's license is considered a property interest under the protection of the due process clause. (*Bell v. Burson* (1971), 402 U.S. 535, 29 L. Ed. 2d 90, 91 S. Ct. 1586.) In *Mathews v. Eldridge* (1976), 424 U.S. 319, 47 L. Ed. 2d 18, 98 S. Ct. 893, the Supreme Court held that due process did not require that a hearing be held prior to the termination of disability benefits under the Social Security Act. In its holding, the court stated there are three factors for consideration in determining when a prior hearing is required to afford due process:

> "[1] the [nature of the] private interest that will be affected by the official action;
>
> [2] the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;
>
> [3] the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." (424 U.S. 319, 335, 47 L. Ed. 2d 18, 33, 96 S. Ct. 893, 903.)

In two subsequent decisions the Supreme Court applied these factors in upholding the termination of driving privileges prior to a hearing. The first, *Dixon v. Love* (1977), 431 U.S. 105, 52 L. Ed. 2d 172, 97 S. Ct. 1723, considered another provision of section 6—206 of the Illinois Vehicle Code. In *Love* the licensee, a truck driver, was first suspended because of three traffic convictions within a 12-month period. He was suspended a second time for driving while his license was suspended and was suspended a third time for three speeding convictions in a 12-month period. Upon the third suspension, his license was revoked under the Code's provisions for having been suspended three times within a 10-year period. The licensee did not request a post-revocation hearing, which, as now, was available. As the plaintiff did here, Love immediately filed suit

claiming he had a right to a prerevocation hearing. The Supreme Court examined the three factors in *Mathews* and first judged that a driver's license, though important, was "not so great as to require" a prerevocation evidentiary hearing. (431 U.S. 105, 113, 52 L. Ed. 2d 172, 180, 97 S. Ct. 1723, 1728.) Second, the court considered that the risk of erroneous deprivation was not great, because the basis of the revocation, *i.e.*, the suspensions and convictions, were facts simply recorded and were not by their nature subject to subjective or differing interpretations. Thus, the only risk of an erroneous deprivation of a right was through clerical error. Third, the court held that the governmental interest for such a procedure of revocation was great. Most important was the public interest in removing drivers from the roads who were public hazards. There was the additional interest of administrative efficiency which would be hindered by the necessity of a prerevocation hearing which licensees often would request simply to delay the revocation process.

In *Mackey v. Montrym* (1979), 443 U.S. 1, 61 L. Ed. 2d 321, 99 S. Ct. 2612, the driver's license was suspended for refusing to submit to a breath-analysis test. In considering the first factor, the court noted that the property interest (the driver's license) was the same as the interest involved in *Love*, and though there were some factual differences, such as the length of the suspensions involved and the timing for the post-revocation hearings, the differences did not mandate a pre-suspension hearing. Similarly, the governmental interest (the third factor) of highway safety was the same as in *Love*. It would appear that the governmental interest was even greater in *Montrym* because the suspension involved an especially dangerous subgroup of unsafe drivers, drunken drivers. The court cited drunk-driving fatality statistics for Massachusetts, where the driver resided, and stated: "States surely have at least as much interest in removing drunken drivers from their highways as in summarily seizing mislabeled drugs or destroying spoiled foodstuffs" (other situations justifying State action

against property interests prior to a hearing). (443 U.S. 1, 17, 61 L. Ed. 2d 321, 334, 99 S. Ct. 2612, 2620-21.) The court stated that the summary suspension for refusal to submit to a breath test served public safety in three ways: first, it deterred drunk driving; second, it provided an inducement to take the breath test and thus facilitated the collection of evidence for use in judicial proceedings; and third, it removed the hazard of drunk drivers on the roads.

In its consideration of the second factor, the risk of erroneous deprivation, the Supreme Court in *Montrym* went beyond the holding of *Love*. Whereas the risk of an erroneous deprivation was considered minimal in *Love* because the basis of the revocation was simply and nearly irrefutably the presence of three suspensions on the licensee's record, the basis of the action in *Montrym* was the report of a police officer's observations. The evidence that was required for a licensee's suspension, the court stated, was that the "the driver has been arrested for driving while under the influence of an intoxicant, probable cause exists for arrest, and the driver refuses to take a breath-analysis test." In regard to the risk of error in the officer's determination, the court said:

> "The officer whose report of refusal triggers a driver's suspension is a trained observer and investigator. He is, by reason of his training and experience, well suited for the role the statute accords him in the presuspension process. And, as he is personally subject to civil liability for an unlawful arrest and to criminal penalties for willfull misrepresentation of the facts, he has every incentive to ascertain accurately and truthfully report the facts." (*Mackey v. Montrym* (1979), 443 U.S. 1, 14, 61 L. Ed. 2d 321, 332, 99 S. Ct. 2612, 2619.)

The court concluded that the risk of error in the presuspension procedures was "not so substantial" as to deny the licensee due process of law.

The *Montrym* court's reasoning as to the "risk of erroneous deprivation" is applicable to the situation here. In *Montrym,* the suspension was based on the observation of police officers that the driver was under the influence of alcohol and that he refused to submit to a breath-analysis test. That is essentially what was present here: there was a determination that the driver was under the influence of alcohol, and the driver refused to submit to a breath-analysis test. As for the risk of error, the officers here, too, are "trained observers" who are charged with truthfully reporting the facts. While the State, of course, will have the burden of proving the driver guilty beyond a reasonable doubt before criminal sanctions can be imposed, the risk of erroneous deprivation, under *Montrym,* is not so great as to prohibit a revocation or suspension prior to a hearing.

Consideration of the remaining two factors from *Mathews* does not require a contrary result. The private interest (the first factor) here, as in *Love* and *Montrym,* is the privilege of driving a motor vehicle. The interest is concededly important and warrants due process protection, but under the holdings in *Love* and *Montrym,* due process does not mandate a hearing *prior* to the deprivation of this interest. Too, the governmental interest (the third factor,) as in *Love* and *Montrym,* is highway safety. More specifically, as in *Montrym,* the safety hazard is drunk drivers. It is clear that a serious threat to human life and well-being is posed by those drivers. (See, *e.g., People v. Bartley* (1985), 109 Ill. 2d 273, 285.) While drunk driving and its consequences represent one of our society's gravest problems, it should not be overlooked that it is a problem that at least in part is remediable. A summary revocation of driving privileges both deters drunk driving and removes drunk drivers from public roads.

The plaintiff argues that he does not pose a threat to public safety because his driving record prior to this incident was good, and that a summary revocation is appropriate only, if at all, for habitual offenders. The plaintiff's driving resulted in serious injuries to two persons. The application of the statute and the Secretary's guidelines to the plaintiff was not improper or contrary to the governmental interests.

For the reasons given, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

ORDER **CCG-2**

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT—CHANCERY DIVISION

PEOPLE OF THE STATE OF
ILLINOIS Ex Rel.
RONALD EPPINGA,

Plaintiff

vs. NO. 85 CH 2082

JIM EDGAR, Secretary of State,
State of Illinois,

Defendant

ORDER

This matter coming to be heard on defendant's Motion to Dismiss under section 2-615 of the Ill. Code of Civil Procedure; the plaintiff having filed a memorandum in response; the defendant's having filed a reply; the court having read the Motion and above-mentioned memoranda and having heard the arguments of counsel; the Court finds as follows:

1. The Plaintiff's complaint states a cause of action and the Motion to Dismiss pursuant to section 2-615 of the Code of Civil Procedure is denied;

2. There are no genuine or material contested issues of fact and no evidentiary hearing on the complaint is necessary;

3. The response memorandum of the plaintiff and the reply of the defendant shall be ruled upon as defendant's Motion for Summary Judgment;

4. The court sustains defendant's Motion for Summary Judgment and finds that *Ill. Rev. Stat.* ch 95 1/2 par. 6-206(a)(1) is constitutional on its face and as applied to the facts set forth in the pleadings and memoranda filed in this cause.

5. The court may file a written opinion setting forth its reasons in support of this order within 10 days of the date of this order and said opinion shall be deemed as filed on the date of this order, *nunc pro tunc.*

6. There is no just cause or reason to delay appeal or enforcement of this order.

Atty No.	#51985
Name	NEIL F. HARTIGAN, Att. Gen. of Il.
	THOMAS J. PLATT, Asst. Att. Gen.
Attorney for	Defendant
Address	160 N. LaSalle St. - Rm. 850
City	Chicago, Illinois 60601
Telephone	312/793-7306

ENTERED
CLERK OF THE CIRCUIT COURT
MORGAN M. FINLEY
MAR 22, 1985
JUDGE ANTHONY J. SCOTILLO

DEPUTY CLERK ....., 19....
MORGAN M. FINLEY, CLERK OF THE CIRCUIT COURT OF COOK COUNTY

Entered
CLERK OF THE CIRCUIT COURT
MORGAN M. FINLEY
APR 1 1985
JUDGE ANTHONY J. SCOTILLO
DEPUTY CLERK _____

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT—CHANCERY DIVISION

PEOPLE OF THE STATE OF
ILLINOIS Ex Rel.
RONALD EPPINGA,

Plaintiff

vs. NO. 85 CH 2082

JIM EDGAR, Secretary of State,
State of Illinois,

Defendant

MEMORANDUM ORDER

This case comes before the Court on the Motion of Defendant, THE ILLINOIS SECRETARY OF STATE, to dismiss the Complaint or in the alternative, for summary judgment in Defendant's favor.

This action arises out of the revocation of Plaintiff's driver's license by the Secretary of State (the Secretary). The Complaint seeks mandamus, quo warranto, declaratory and injunctive relief to restore Plaintiff's driver's license privileges.

On January 9, 1985, Plaintiff was arrested and charged with driving under the influence of alcohol (DUI). The case has not yet gone to trial and Plaintiff has not been convicted of the offense. On February 15, 1985, the Secretary issued an order revoking Plaintiff driver's license pursuant to § 6-206(a)(1) of the Illinois Vehicle Code (Ill. Rev. Stat., 1981, Ch. 95 1/2, Par. 6-206(a)(1)) § 6-206(a)(1) provides:

> (a) The Secretary of State is authorized to suspend or revoke the license or permit of any person without preliminary hearing upon a showing by his records or other sufficient evidence that such person:
>
> (1) has committed an offense for which mandatory revocation of license or permit is required upon conviction.*

Pursuant to his rulemaking authority under § 6-211(a), the Secretary has adopted regulations with respect to application of § 6-206. The applicable rule here, 92 Il. Admin. Code, Ch. II, § 1040.35, 8 Il. Reg. 2203-2205 (1984); sets out what constitutes "sufficient evidence" under § 6-206(a): This evidence includes Court documents, Coroner's transcripts, accident reports, eyewitness affidavits and any other evidence deemed important and probative by the prosecuting State's Attorneys.

The revocation notice sent to Plaintiff gave him the right to request a prompt hearing on the revocation. Plaintiff did not request such a hearing but filed this action instead. It is Plaintiff's position that the revocation procedure and the statute under which the Secretary acted are violative of due process. Plaintiff seeks a restoration of his license and a declaration that § 6-206(a)(1) is unconstitutional.

Although both parties have made a number of arguments dealing with the sufficiency of the complaint, the real issue revolves around the due process question. Was Plaintiff afforded sufficient due process when the Secretary revoked his license? Is § 6-206(a)(1) as implemented by the Secretary's regulations, constitutionally adequate under the Due Process Clause?

Plaintiff argues that § 6-206 should not be construed to give the Secretary broad judicial power to make a determination of whether a revocable offense has been committed without

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* Under § 6-205(a), DUI is such an offense.

the procedural safeguards normally afforded those accused of such an offense. (e.g., notice, hearing, right to counsel, confrontation of witnesses etc.)

It has been established by the Supreme Court that once driver's licenses are issued, they become a property interest entitled to due process protection. It was held in *Bell* v. *Burson*, 402 U.S. 535 (1970) that,

> "Once licenses are issued, as in petitioner's case, their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment."

It is not always necessary that there be an evidentiary hearing before one may be deprived of a protectable interest. As the Supreme Court stated in *Matthews* vs. *Eldridge*, 424 U.S. 319 (19/6) "Something less than an evidentiary hearing is sufficient prior to adverse administrative action." The *Matthews* decision set out the factors to be considered in determining what process is due. These factors are:

1) The private interest that will be affected by the official action;

2) The risk of an erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional or substitute procedural safeguards;

3) The Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Since the *Matthews* decision, the Supreme Court has twice considered the due process issue in connection with driver's licenses. *Dixon* vs. *Love*, 431 U.S. 105 (1976); *Mackey* vs. *Montrym*, 443 U.S. 1 (1979). Both cases found that predeprivation hearings were not necessary and that the procedures and rules followed by those states did afford the licensee due process.

In *Dixon,* the Plaintiff's Illinois driver's license had been revoked under § 6-206(a)(2). This section allows revocation without a hearing when the licensee has been convicted of three or more traffic offenses within twelve months. The Plaintiff challenged the statute as unconstitutional as allowing summary revocation without a hearing. The Court found that under *Matthews,* a pre-revocation hearing was not necessary because of the nature of the interest involved. The interest there, a driver's license, was not so vital and essential as other interests that may require a pre-deprivation hearing. (The Court used as an example the social insurance payments that were the issue in *Goldberg* vs. *Kelly,* 397 U.S. 254 (1970)). The Court found the risk of erroneous deprivation minimal as there had already been hearings on the convictions. Finally, the Court held that the substantial public interest in safety on the roads and prompt removal of a safety hazard was weighty enough for the State to make its summary decision without a pre-revocation administrative hearing. The Court also considered the fact that the Plaintiff could get a prompt post-deprivation hearing.

In *Mackey* vs. *Montrym,* (Supra), the Court upheld a Massachusetts statute requiring suspension of a driver's license for refusal to submit to a breath analysis upon arrest for DUI. Suspension was to be ordered upon receipt of the police report of the licensee's refusal to take the test. The Court there also used the *Matthews* test and found the statute afforded sufficient due process. The Court followed *Dixon* and found the summary suspension procedures constitutional in light of the nature of the private interest involved. It was also held that there was no risk of error inherent in the procedure as there was insubstantial risk of erroneous observation or deliberate misrepresentation by the reporting police officer. Lastly, the Court found that the compelling interest in highway safety justified the summary suspension prior to a prompt post-suspension hearing.

Although the challenged statute here differs slightly from those in *Mackey* and *Dixon*, the reasoning of those cases still applies. Both the private and governmental interests involved here are the same as in *Dixon* and *Mackey* (driver's licenses and highway safety respectively). Those cases both held that considering those interests, a pre-deprivation hearing was not necessary. Under the Matthews analysis then, the only factor to consider in this case is whether there is a risk of erroneous deprivation resulting from the procedures utilized by the Secretary.

While the statute alone appears to give the Secretary rather broad power in determining whether an offense has been committed, the rules promulgated under this statute limit and define the power.

In the instant case, Plaintiff was charged with DUI. Under § 6-206(a)(1), this is an offense for which a license can be revoked without a hearing upon sufficient evidence of commission. The Secretary's rule § 1040.35 limits this to situations where serious bodily injury or death results. So even if there is sufficient evidence that a licensee committed the offense of DUI, the Secretary will only consider revocation where there is serious bodily injury.

The Secretary further limits its discretion by listing what can be considered as sufficient evidence in determining whether an offense was committed. This includes such reliable evidence as eyewitness affidavits, accident reports, laboratory reports and "other documentation deemed important and probative by the State's Attorneys." All this information must be provided to the Secretary by the State's Attorney.

The Secretary does not have unbridled discretion in deciding whether a licensee committed a revocable offense. The decision is based on documentation supplied by reliable sources. The *Mackey* court found that the risk of erroneous observation or deliberate misrepresentation by the reporting

officer of the facts forming the basis for the suspension was insubstantial. Such a finding applies to this situation as well. All the evidence submitted to the Secretary must be provided by the State's Attorney and found by him to be important and probative. Since the State's Attorney must eventually prosecute the case, he would only be interested in the documentation that would be substantial enough to prove the offense was committed. The Secretary should be able to rely on the State's Attorney's determination that the evidence is very probative. The risk that the initial report or documentation, as well as its review by the State's Attorney, would be erroneous, is very minimal.

Finally, the Plaintiff here, as in *Dixon* and *Mackey*, is entitled to a prompt post-deprivation hearing under the Secretary's rules. (§ 1040.35(b) (9)) Both of those cases stressed the availability of such a hearing as an important factor in considering the adequacy of the due process. Even though the risk of erroneous deprivation is slight here, the Plaintiff would not be deprived long of his license before he could obtain a hearing encompassing all the procedural safeguards he seeks.

In conclusion, the Court finds that § 6-206(a) (1) and the rules promulgated thereunder by the Secretary are constitutional. The Secretary's guidelines afford sufficient due process to the licensee in light of the substantial state interest involved. Drunken driving is a very serious problem which endangers all those using the highways. The State must have a process for promptly removing these safety hazards. The compelling interest in highway safety justifies the Secretary in making a summary revocation effective pending the outcome of a post-revocation or criminal hearing.

For the reasons herein stated, IT IS HEREBY ORDERED, that the Defendant's Motion for Summary Judgment is granted.

ENTERED
CLERK OF THE CIRCUIT COURT
MORGAN M. FINLEY
APR 1 1985
JUDGE ANTHONY J. SCOTILLO
DATED: April 1, 1985